3-3-2000

Renewed Motion to Exclude Expert Testimony of Gregg McCrary

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CHARLES MURRAY, Administrator of the Estate of SAMUEL H. SHEPPARD Plaintiff vs. STATE OF OHIO Defendant	)	Judge Ronald Suster Case No. 312322 **RENEWED MOTION TO EXCLUDE EXPERT TESTIMONY OF GREGG MCCRARY**

Plaintiff hereby moves this Court for an Order striking Gregg McCrary as a potential expert witness and to preclude the Defendant, State of Ohio, from offering any testimony from him. The reasons and authorities for granting this motion are set forth fully in the attached brief in support, which is hereby incorporated by reference.

Respectfully submitted,

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Brief In Support

I. Background

In December, 1999, Plaintiff filed a motion to exclude the testimony of Gregg McCrary, a retired FBI investigator, as a proffered "expert" witness on behalf of the State. On January 13, 2000, this Court ruled that Plaintiff's motion was denied, pending an expert *voir dire* of Mr. McCrary. Due to the rulings of this Court thus far in the trial, Plaintiff now moves this Court to exclude the testimony of Mr. McCrary without reaching the expert *voir dire*, for the reasons stated below.

II. Law and Argument

There are three grounds for this motion, which will be addressed in consecutive order.

A. Character Testimony

It is well settled that testimony by a "profiler" or crime scene analyst impermissibly places a person's character into issue, in violation of R.Evid. 404(A). In *State v. Haynes* (1988), Ninth Dist. App. No. 4310, *unreported*, 1988 Ohio App. LEXIS 3811, the Ninth District Court of Appeals reversed a criminal conviction because of the admission of the testimony of a "criminal profilist." In *State v. Roquemore* (1993), 85 Ohio App. 3d 448, the Tenth District Court of Appeals held that the trial court's admission of a "crime scene assessment" constituted reversible error. In both cases, the testimony was held to have violated R.Evid. 404(A)(1) by admitting evidence of character. Additionally, in *Roquemore*, the trial court was reversed for improperly applying the R.Evid. 403 balancing test, and allowing testimony whose prejudicial tendencies outweighed its probative value. *Id.* at 455-456. Finally, testimony regarding "crime scene analysis" unreasonably invades the province of the jury in making ultimate determinations of fact, and is therefore inadmissible. *Id.* at 454, *citing State v. Koss* (1990), 49 Ohio St. 3d 213, 216, 551 N.E.2d 970, 972-974.

These cases directly apply to the instant case, and should prohibit the State from offering the testimony of Mr. McCrary, as violating R.Evid. 403, 404, and 702. Mr. McCrary's "expert" report explains that his "crime scene assessment" leads him to conclude that Dr. Sam Sheppard must have committed the crime. This falls squarely within the type of testimony prohibited in *Roquemore* and *Haynes*, and is impermissible.

B. Credentials and Qualifications

The Ohio Supreme Court has ruled that scientific or technical evidence is "subject to a judicial analysis for prejudice" under Ohio R.Evid. 403, *State v. Pierce*, 64 Ohio St. 3d 490, 497, 597 N.E.2d 107, 112 (1992). In determining the admissibility of purported "expert" testimony, a trial court must examine the methods used by a proffered expert witness in reaching any conclusions, and the conclusions themselves, in balancing "the probativeness, materiality, and reliability of the evidence against the risk of misleading or confusing the jury or unfairly prejudicing the [adverse party]." *Id.* at 496, 597 N.E.2d at 112, *quoting* CASE NOTE, *UNITED STATES V. TWO BULLS:* EIGHTH CIRCUIT ADDRESSES ADMISSIBILITY OF FORENSIC DNA EVIDENCE (1991), 37 Loyola L.Rev. 173, 177.

This approach requires a trial court to critically examine a proffered expert witness' credentials and the methodology underlying the opinions reached by the witness, in order to prevent the jury from being misled or confused by expert testimony. Here, the State's proffered expert witness does not have adequate credentials to render opinion testimony regarding the issues in his report, and the conclusions in his report are unreliable.

Ohio R.Evid. 702(B) requires that a witness be "qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony." Here, Mr. McCrary's professional qualifications are inadequate. Mr. McCrary obtained a Bachelor

of Fine Arts degree in an area unrelated to his testimony,[1] and a Master of Arts in "Psychological Services," which does not allow him to practice psychology or psychiatry in any way.[2] Mr. McCrary has never handled a domestic homicide investigation,[3] has not had any formal training in the area of domestic homicides,[4] has published only one article, in an area unrelated to this case,[5] and has done no published research work.[6] Mr. McCrary has no accredited degree in criminology,[7] and has never testified to a jury regarding the results of any of his crime scene analyses.[8]

Mr. McCrary renders opinions in at least three recognized scientific fields. Criminology is a social science that deals with the collection and interpretation of crime-related statistics. Criminalistics is a field of forensic science dealing with the analysis of physical evidence relating to crime. Victimology is a sociological specialty dealing with statistical analysis of crime patterns and the likely victims of various crimes.

However, Mr. McCrary possesses no "specialized knowledge, skill, experience, training, or education" in any of these fields. Nothing in his background reveals any training in these fields, and he does not state that he has ever testified as an expert witness in any of these fields.

In reality, Mr. McCrary's expertise seems to be in the novel scientific field of "behavioral criminology." No reference is made to any training in this area, or even to any standard treatises or

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[1] *See* McCrary deposition at 10.

[2] *See* McCrary deposition at 11-13.

[3] *See* McCrary deposition at 19.

[4] *See* McCrary deposition at 29-30.

[5] *See* McCrary deposition at 29-30.

[6] *See* McCrary deposition at 33-34.

[7] *See* McCrary deposition at 36.

[8] *See* McCrary deposition at 27-28.

commonly accepted theories central to this field. Therefore, pursuant to this court's duty to exclude testimony of purported experts which could prove misleading or confusing to the jury, Mr. McCrary should be prevented from testifying, as he does not possess adequate credentials or proof of "specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony," as required by Ohio R.Evid. 702(B).

C. Reliability of Methods and Conclusions

Mr. McCrary's testimony should also be excluded because of his failure to satisfy the requirements of Ohio R.Evid. 702(C) that testimony be "based on reliable scientific, technical, or other specialized information."

> In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known potential rate of error, and (4) whether the methodology has gained general acceptance. Although these factors may aid in determining reliability, the inquiry is flexible. The focus is "solely on principles and methodology, not on the conclusions that they generate."

Miller v. Bike Athletic Co., 80 Ohio St. 3d 607, 611-612, 687 N.E.2d 735, 740 (1998), *quoting Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (citations omitted).

Nothing in Mr. McCrary's report can satisfy this standard of scientific reliability. His theories are not peer reviewed or published to a general community of "behavioral criminologists;" in fact, his *curriculum vitae* does not reveal a single published article or theory. Although "while peer review may be helpful, is it not absolutely necessary for an opinion to be admissible," *Miller, supra*, at 613, 687 N.E.2d at 741, the lack of peer review should be considered by this Court as weighing heavily against reliability. Similarly, without publication or peer review,[9] an error rate

[9]Mr. McCrary is unaware of any empirical or statistical studies regarding staged domestic homicide. *See* McCrary deposition at 48-49.

cannot be derived, and tests cannot be conducted. Thus, Mr. McCrary's testimony is not "scientific" for purposes of Ohio R.Evid. 702(C).[10]

Therefore, Mr. McCrary's testimony must be considered "technical or other specialized information" under Ohio R.Evid. 702(C). Even this non-scientific testimony must be scrutinized for reliability prior to its admissibility. *State v. Stowers*, 81 Ohio St. 3d 260, 262, 690 N.E.2d 881, 883 (1998). Only "[r]elevant evidence based on valid principles will satisfy the threshold reliability standard for the admission of expert testimony." *State v. Nemeth*, 82 Ohio St. 3d 202, 211, 694 N.E.2d 1332, 1339 (1998). Therefore, this court must prevent the admission of any testimony not satisfying this fundamental requirement.

> Key questions for resolution by the trial court include: whether the reasoning or methodology can be or has been tested; whether the theory or technique has been subjected to peer review and publication; considerations of the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and, finally, considerations of whether the methods or techniques have gained "general acceptance" should be considered.

State v. Clark, 101 Ohio App. 3d 389, 415, 655 N.E.2d 795 (1995).

Mr. McCrary's testimony is exactly the sort of purported expert testimony this threshold admissibility requirement was designed to prevent. He admits that he is not licensed or formally trained in sociology,[11] and concedes that he made up the name for his agency, "behavioral criminology," without reference to any recognized field,[12] and that his field of expertise, "crime scene criminal investigative analysis," is not a recognized forensic science.[13] Mr. McCrary further

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[10]To his credit, Mr. McCrary admitted, when cross-examined on his statements to the media, that suspect profiling is "far from a hard science and the purpose is to screen potential suspects." McCrary deposition at 44.

[11]*See* McCrary deposition at 37.

[12]*See* McCrary deposition at 35.

[13]*See* McCrary deposition at 37.

admits that it is not unusual in his field for two similarly trained and experienced people to come up with very different opinions, and that his field is not an exact science.[14]

Without reference to any "valid principles" from which he draws his conclusions, Mr. McCrary opines that various elements of Dr. Sam Sheppard's alibi are inconsistent, and that various elements of the crime scene are inconsistent with various other theories of how the murder of Mrs. Sheppard was perpetrated, and are instead consistent with a "staged domestic homicide."

Mr. McCrary does not reach these conclusions through any recognized field of science. Criminology and victimology are statistical sciences, based on the statistical likelihoods of criminal activity within a given population. These sciences are only investigative tools, because no statistical analysis can be applied to a population sample of one; in other words, statistical analysis can be relevant in determining the most likely perpetrator of a crime during an investigation, but cannot be scientifically applied to determining the actual facts in an individual murder.

Mr. McCrary's theories and conclusions have not been tested; he has not published them, or subjected them to any other method of peer review; his technique cannot be quantified into any meaningful calculation of errors or false positives; and his field, "behavioral criminology," is not generally recognized by the appropriate community. Thus, Mr. McCrary's testimony is not "reliable," as "scientific, technical, or other specialized knowledge" that would be helpful to the trier of fact.

III. Conclusion

Mr. McCrary should not be permitted to testify for the State, on three grounds. First, his testimony is substantively inadmissible, based on its violation of R.Evid. 403, 404, and 702. Second,

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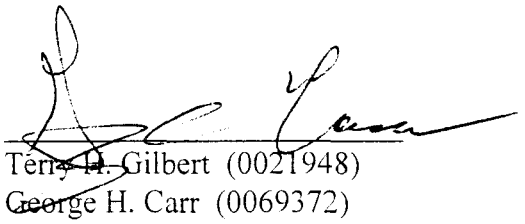
[14] *See* McCrary deposition at 57.

his lack of qualifications prevent him from giving the testimony under R.Evid. 702(B). Finally, the conclusions he reaches are not "reliable" within the meaning of Ohio R.Evid. 702(C). Therefore, this Court should enter an order *in limine* preventing his testimony at trial.

Respectfully submitted,



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Certificate of Service

The undersigned certifies that the foregoing Renewed Motion *in limine* to Exclude Expert Testimony of Gregg McCrary has been served on William Mason, Prosecuting Attorney, Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 on this 3rd day of March, 2000.

George H. Carr (0069372)
Attorney for Plaintiff

6TH CASE of Focus printed in FULL format.

STATE OF OHIO, Plaintiff-Appellee v. RICHARD HAYNES, Defendant-Appellant

C.A. No. 4310

Court of Appeals of Ohio, Ninth Appellate District, Lorain County

1988 Ohio App. LEXIS 3811

September 21, 1988, Decided

PRIOR HISTORY:
[*1]

APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT, COUNTY OF LORAIN, OHIO, CASE NO. 33966

DISPOSITION: Based upon our disposition of the first assignment of error, Haynes' conviction is hereby reversed and the cause remanded for a new trial.

COUNSEL: GREGORY A. WHITE, Prosecuting Attorney, Elyria, OH for Plaintiff.

JOSEPH C. GRUNDA, Attorney at Law, Lorain, OH for Defendant.

OPINIONBY: CACIOPPO

OPINION: DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CACIOPPO, J.

Defendant-appellant, Richard Haynes, appeals his conviction for the murder of Douglas Fauver. The facts surrounding Fauver's death, according to Haynes, are as follows. Haynes claimed that at approximately 6:30 p.m. on the evening of October 20, 1986, he went to Fauver's apartment to fill out a job application Haynes accepted several drinks from Fauver and also took some pills which Fauver claimed to have been speed.

Haynes' next recollection is waking up at approximately 11:30 p.m. to discover Fauver, naked, sitting across from him. Fauver then told Haynes he had performed an act of fellatio upon him and asked him how he liked it. Haynes went [*2] to the bathroom to wash up, and used the shower to run cold water on his head to clear his mind, claiming he was still groggy from the drugs. He went into Fauver's bedroom, got a pair of pants, threw them at Fauver and told him to put them on. Haynes then began tearing up Fauver's bedroom looking for his address book that was missing and the application he had filled out.

As Haynes was coming out of the bedroom, Fauver came at him with a small paring knife. The two men started fighting in the area between the kitchen and bedroom. Fauver cut Haynes wrist with the knife, and Haynes then grabbed Fauver in a headlock and stabbed him twice in the chest. Fauver fell backwards, but then stood up and started walking toward the bedroom. Haynes grabbed a large knife off the kitchen back. n1 Haynes then sat in a chair for approximately two hours waiting for the police to arrive since there had been so much noise during the struggle. When the police did not arrive, Haynes left the apartment. Fauver's body was discovered the next day.

n1 The autopsy report revealed that Fauver had been stabbed nine times; the cause of death was aspiration of blood caused by a stab wound in the chest.

Thereafter, [*3] Haynes stole a car and drove to Florida. After several days, he went to Tennessee, California, and finally stopped in Arizona. In Arizona, Haynes was arrested on an unrelated charge. Detective Medders of the Elyria Police Department went there to pick him up.

In an interview at the Arizona jail, Haynes related the preceding story to Detective Medders. State's Exhibit 3. Haynes had also made statements to the Arizona authorities, and left a written version of his story (State's Exhibit 5) in his cell.

Haynes was indicted and charged with murder, in violation of *R.C. 2903.02(A)*, and one count of grand theft of a motor vehicle, in violation of *R.C. 2913.02(A)(1)*. Upon notice that the state intended to introduce the testimony of Robert Walter, an expert in criminal profiles, defense counsel filed a motion in limine. After a hearing, the trial court provisionally denied the motion subject to voir dire of the expert prior to his testimony. At

the trial, voir dire of the expert was conducted and the trial court decided to admit the testimony. n2

n2 Defense counsel entered a continuing objection to the expert's testimony.

The jury was instructed on the law with respect to [*4] murder, voluntary manslaughter, self-defense, and the influence of intoxication, drugs, and/or anger. Haynes was found guilty on both counts of the indictment and sentenced to a term of fifteen years to life for the murder and a consecutive term of two years for the theft. Haynes now appeals.

ASSIGNMENT OF ERROR I

"The trial court erred to the prejudice of appellant when it permitted the testimony of a criminal **profilist** where neither the scientific reliability nor the general acceptance of the theories proposed by the **profilist** had been established, and the prejudicial effect of the testimony far outweighed its probative value."

This assignment of error concerns the **admission** of the testimony of Robert Walter as an **expert** in criminal **profiling**. Walter testified as to the distinction between a homophobic murder and an anger-retaliatory murder. The state argues that this testimony shows that, based on the timing of the events, along with other factors, the crime did not occur according to the state's perception of what Haynes claimed, i.e., that it was not a homophobic murder done out of panic after an unsolicited homosexual encounter, but rather an anger-retaliatory killing [*5] committed purposely after a cooling off period. Haynes makes several arguments as to why the testimony should have been excluded, including the argument that he never actually claimed he killed Fauver out of panic resulting from the homosexual encounter; that he was, instead, claiming self-defense from a knife attack. Haynes argues that the state set up the theory of homophobic murder as a strawman argument and then set out to attack it. The record supports this assessment and several other of the appellant's arguments.

The **admission** of this testimony is troubling for many reasons. Using an analysis based on the rules of evidence, we will address the reasons for exclusion propounded by the appellant, as well as several other reasons for exclusion of this testimony.

Evid. R. 401 provides:

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Walter's testimony appears to be facially relevant as it may be considered to show that it was more probable that Haynes purposely killed Fauver.

Evid. R. 402 provides:

"All [*6] relevant evidence is **admissible**, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not **admissible.**" (emphasis added).

It is at this point in the evidentiary analysis that our concern arises. Our review of the record leads us to find that **admission** of Halter's testimony conflicts with several evidentiary rules.

Evid. R. 702 provides:

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Haynes argues that the state failed to establish that the expert's theory was either generally accepted n3 or scientifically reliable, and that the trial court therefore had no basis upon which to make this important threshold determination. The state asserts that, by his argument, [*7] Haynes "overlooked that technical or specialized knowledge that will assist the trier or tact to understand the evidence or determine a fact in issue may be used if the witness has expert knowledge ***." Appellee's brief at 5. The state has overlooked the principle that unless scientific evidence and/or theory can be considered reliable, it cannot be of assistance to the trier of fact.

n3 We note that appellant refers to proof of "general acceptance" of scientific evidence as a prerequisite to **admissibility**. This standard was established in *Frye v. United States (1923), 293 F. 1013,* and has been the subject of constant debate by both the courts and commentators. The Supreme Court of Ohio has rejected the "Frye test" in favor of a more flexible standard of **admissibility** derived from the Rules of Evidence. See *State v. Williams (1983), 4 Ohio St. 3d 53.* Therefore, we will analyze the evidence in this case in accordance with the rules.

During the voir dire examination of the **expert,** the state concentrated primarily on Walter's qualifications as a criminal **profiler** rather than the reliability of the underlying theory of criminal **profiling**. Although Walter [*8] stated that criminal **profiling** can be used in many different ways, he only explained its use for investigatory purposes:

"Q. What exactly do you mean by criminal **profiling,** sir?

"A. Criminal **profiling** can be used in many different ways.

"One of the ways in which it's often used is when a suspect is unknown in a crime, then one analyzes not only the act, the criminal act itself, then one evaluates the crime scene evidence which surrounds that, then one evaluates and reviews all Police Reports, and gets an indication, based upon probability, based upon experience, based upon consistency with patterns that are developed within crimes, that, then, one can look forward and offer a profile for the police to apprehend the suspect."

"***."

T. at 83.

"*** The purpose of the profile is to shape the investigation predicated upon the crime scene evidence and the available evidence independent of who the specific perpetrator is.

"One is interested in what is presented, what the criminal act was, how that relates, and what kind of profile that forms which helps the Police in terms of looking for a suspect.***."

T. at 92.

Although Walter is a licensed psychologist, his testimony was [*9] not related to psychology, but to the field of criminal **profiling**. T. at 134-135. Walter testified that he had performed **profiling** services for investigatory purposes for police departments in several states, for the British and Australian governments, and for various agencies; he also stated that the FBI uses profiles. T. at 82-84.

Although this testimony may indicate that profiles may be a reliable investigative tool, there is little indication in the record that they can be said to be reliable for the purposes for which they were used by the state in the instant case. Walter stated that he had testified in three other murder trials, including *People v. Drake (1987), 129 App. Div. 2d 963, 514 N.Y.S. 2d 280.* n4 Walter's testimony in Drake, however, is distinguishable from that in the instant case, in that the defendant there maintained that he had accidentally killed two occupants of a car when he fired several rounds of ammunition into what he believed was an abandoned car. The victims' bodies displayed stab wounds, bullet wounds, bite marks, and anal bruises. Walter concluded that the circumstances of the case indicated a pathological condition known as piquerism, [*10] where the perpetrator realizes sexual satisfaction from penetrating a victim by sniper fire, or by stab or bite wounds. *Drake, supra, 514 N.Y.S. 2d, at 281.* Walter's testimony in the instant case did not concern a pathological condition, nor did it concern the specific profile of piquerism. Conceivably, a problem may also exist in that one type of profile may not be as reliably identifiable as another.

n4 Walters did not specifically state the names or details of the other two cases in which he had testified.

The relevancy/**admissibility** analysis of novel scientific evidence also requires that the expert's testimony assist the trier of fact to understand the evidence or determine a fact in issue. If the subject of the testimony is within the understanding of the jury, it is inadmissible. See *State v. Thomas (1981), 66 Ohio St. 2d 518, at 521.* It also appears that the main point made by expert testimony in the instant case was well within the understanding of the average juror, as demonstrated by the following colloquy on direct examination:

"***.

"Q. So, basically, your testimony, then, as a criminal profiler is that there are certain fact patterns that are exhibited [*11] in a homophobic murder and certain fact patterns that are exhibited in an anger-retaliatory type murder?

"A. Right.

"Q. You're indicating that your review of this case indicates this murder was not committed as the result of a panic that ensued after an unwanted homosexual encounter?

"A. Correct.

"Q. The real key to that is the timing?

"A. Yes.

"Q. This death did not occur immediately after the

Defendant's finding out about the undesirable and horrid sexual encounter he says he had?

"A. Right."

"***."

T. at 118-119.

The issues of timing and sudden panic are directly related to the distinction between voluntary manslaughter and murder. From the defendant's confession, a jury could decide for themselves that he did not kill Fauver immediately after discovering that he had been assaulted, but that a period of time had elapsed in which he could have "cooled off". The use of expert testimony for this purpose was improper; the prejudicial impact outweighed probative value, as it tended to "sensationalize" the facts and issues.

The testimony as to timing and panic embraced the ultimate issue of intent to be decided by the jury. See Evid. R. 704. Under Evid. R. 704, "[o]pinion [*12] testimony on an ultimate issue is **admissible** if it assists the trier of the fact, otherwise it is not **admissible**. The competency of the trier of the fact to resolve the factual issue determines whether or not the opinion testimony is of assistance." Staff Note to Evid. R. 704. For this reason, an ultimate issue opinion by an expert should be excluded in extreme cases where that opinion is inherently misleading or unduly prejudicial. Weissenberger's Ohio Evidence (1982), Section 704.3.

This leads us to discuss the problems this case presents with respect to Evid. R. 403, which provides:

"(A) Exclusion Mandatory. Although relevant, evidence is not **admissible** if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

The introduction of Walter's testimony can also be considered to have confused the issues and/or misled the jury, by setting up the strawman argument discussed previously.

Further, Walter testified that criminal profiles identify types of perpetrators. In *Thomas, supra, at 521,* the Supreme Court rejected **admissibility** of testimony on the battered woman syndrome, partly out of a [*13] belief that such testimony would tend to stereotype a defendant, causing the jury to become prejudiced. The court believed there was a danger that the jury "could decide the facts based on typical, and not the actual, facts." *Id. at 521.*

In the instant case, Walter testified that the appellant's version of the killing and his subsequent actions were classically typical of an anger-retaliatory murder. In fact, Walter testified at great length and in great detail as to the traits and characteristics of such a type of murderer, and found that the appellant's actions and motivations matched that profile.

The possibility of stereotyping also brings up the possibility that **admission** of the expert testimony violated Evid. R. 404(A)(1):

"(A) Character Evidence Generally. Evidence of a person's character or a trait of his character is not **admissible** for the purpose of proving that he acted in conformity therewith on a particular occasion, subject to the following exceptions:

"(1) Character of Accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same is **admissible**; however, in prosecutions for rape, gross sexual imposition, [*14] and prostitution, the exceptions provided by statute enacted by the General Assembly are applicable."

"***."

Courts in other states, in considering the **admissibility** of the battering parent profile, have treated the profile as evidence of the defendant's character; that is, to show that the defendant matches the profile and therefore is more likely to have committed the particular abuse charged. Gianelli & Imwinkelried, Scientific Evidence (1986) 302, Section 9-7.

"*** Generally, character evidence is inadmissible unless the defendant first introduces evidence of his own good character. Since the defendants in these cases had not introduced character evidence, the courts have excluded expert testimony concerning the battering parent profile."

"***."

Id.

In *Sanders v. State (1983), 251 Ga. 70, at 76, 303 S.E. 2d 13, at 18,* the court stated:

"***[U]nless a defendant has placed her character in issue or has raised some defense which the battering parent syndrome is relevant to rebut, the state may not introduce evidence of the syndrome, nor may the state introduce character evidence showing a defendant's personality traits and personal history as its foundation [*15] for demonstrating the defendant has the characteristics

of a typical battering parent. ***."

See, also, *State v. Durfee (Minn. 1982), 322 N.W. 2d 778, 785; State v. Loebach (Minn. 1981), 310 N.W. 2d 58,*, 64; "Annotation (1986), *43 A.L.R. 4th 1203.*

In the instant case, Haynes will not testify, and therefore did not place his character in issue. "It is Universally the rule that the prosecution, as part of its 'case in chief, may not offer evidence of the accused's character in order to show his propensity to perform the acts underlying the crime that is charged." Weissenberger, supra, Section 4045.

Walter's testimony on the anger-retaliatory profile was laden with references to personality and character traits of the accused that matched the profile of a deliberate killer. The testimony, therefore, can be considered inadmissible solely on the basis of Evid. R. 404(A)(1).

The last rule which Haynes claims was violated is Evid. R. 703:

"The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

The Ohio rule differs markedly from Fed. R. Evid. 703 in that the [*16] federal rule also allows the expert to base his opinion on information made known to him at or before the hearing. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be **admissible** in evidence." Fed. R. Evid. 703.

Walters testified on cross-examination that he based his opinion on police reports, the autopsy report, and conversations with the prosecutor and the police. Only the autopsy report was admitted into evidence. "Pursuant to Evid. R. 703, an expert may not base his opinion on hearsay but must rely upon his own personal knowledge of facts and data submitted as evidence in the case." Dellagnese v. Sorkin (Mar. 30, 1988), Summit App. Nos. 13036/13229, unreported, at 3 (citing *State v. Jones (1984), 9 Ohio St. 3d 123* and *Fireman's Fund Ins. Co. v. BPS (1985), 23 Ohio App. 3d 56).* See, also, Midwest Specialties, Inc. v. Firestone Tire & Rubber Co. (July 20, 1588), Summit App. No. 13349, unreported) The conversations [a]fter had with the police and the prosecutor are clearly hearsay.

Admission of expert opinion testimony based in part on medical reports [*17] and medical histories not admitted in evidence and not prepared by the witness has been held to be prejudicial error. See *State v. Jones, supra; Kraner v. Coastal Tank Lines (1971), 26 Ohio St. 2d 59.* This holding would apply to police reports as well.

Admission of the expert testimony can be considered error for any or all of the foregoing reasons We must now decide whether the error was prejudicial or harmless. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut (1963), 375 U.S. 85, 86-87* (followed in *Chapman v. California (1967), 386 U.S. 18, 23).* See, also, *State v. Thompson (1981), 66 Ohio St. 2d 496, 499; State v. Lytle (1976), 48 Ohio St. 2d 391.*

Upon review of the record, putting aside the expert testimony, we do not find the independent evidence of Haynes guilt as to murder to be overwhelming. The remaining evidence consisted of the testimony of Donald Thompson, an acquaintance of Haynes. Thompson testified that he had known Haynes for about two or three months, and had seen Haynes in a bar within a few days of the killing. [*18] Thompson stated that Haynes admitted to killing Fauver; that Haynes had gone to Fauver's apartment to fill out a job application, and Fauver had put his hand on Haynes' leg - a scuffle ensued and the stabbing occurred Haynes told Thompson that he killed Fauver because Fauver was gay and Haynes hated gays. T. at 68. Haynes explained the cut on his wrist as the result of a bar fight.

Thompson stated that a few days after this meeting, Haynes gave him a switchblade in exchange for a ring. (Haynes had confessed to the police that he had taken a switchblade from Fauver's apartment) Thompson testified that he did not report Haynes' story to the police because he did not believe Haynes.

Further, although Fauver had been stabbed in the back, the autopsy report states that his death was caused by a stab wound to the chest.

The foregoing not constituting overwhelming independent evidence of guilt, there exists a reasonable possibility that the **admission** of Walter's expert testimony contributed to the appellant's conviction, and therefore the error was not harmless beyond a reasonable doubt.

Haynes' first assignment of error is well taken.

ASSIGNMENT OF ERROR II

"The trial court erred [*19] to the prejudice of appellant when it excluded the contents of a briefcase found in the apartment of the deceased."

Appellant sought to introduce into evidence a suitcase full of pornographic materials, found in the victim's apartment, to show that the victim "had sexual proclivities beyond the mainstream". Appellant's brief

at 18. Haynes asserts that this characteristic was relevant to his claim of being sexually assaulted and would bolster the credibility of his story. The trial court excluded the evidence finding it not relevant to the issue of whether the victim would be more likely to commit a rape or a knifing, and further stated that even if it was relevant, the probative value would be overwhelmed by the prejudicial deductions that could be made from the material.

Evid. R. 404(A)(2) provides:

"(A) Character Evidence Generally. Evidence of a person's character or a trait of his character is not **admissible** for the purpose of proving that he acted in conformity therewith on a particular occasion, subject to the following exceptions:

"***.

"Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused ***."

The inference [*20] that possession of pornographic material indicates any specific kind of character trait, and that such a trait would tend to make it more probable than not that Fauver raped Haynes or attacked him with a knife seems tenuous at best.

Assuming arguendo that this evidence is even remotely relevant, its **admissibility** must still be balanced under Evid. R. 403. Absent a showing of abuse of discretion in applying Evid. R. 403, the trial court's ruling will not be disturbed. See Prickett v. Goodyear Tire & Rubber Co. (Sept. 18, 1985), Summit App. No. 12008, unreported. Abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Pembaur v Leis (1982), 1 Ohio St. 3d 89, 91.* Exclusion of this evidence does not meet this test. Haynes' second assignment of error is not well taken.

Based upon our disposition of the first assignment of error, Haynes' conviction is hereby reversed and the cause remanded for a new trial.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Lorain Common [*21] pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

CONCURBY: MAHONEY

CONCUR: MAHONEY, J. CONCURS SAYING:

I concur in the majority opinion.

My colleague's dissent has suggested that this case should be remanded with instructions to grant a new trial only if the state will not agree to accept a voluntary manslaughter conviction. I must concur that the facts of this case could easily be interpreted to lend themselves to such a solution. However, I know of no authority under which we could lawfully grant the defendant-appellant what could be characterized as an "additur" and force the state to elect to accept the "additur" or go to trial again.

Next, the defendant has a guaranteed constitutional right not to testify. Neither we nor a jury should draw any inferences from his exercise of that right, nor should it give the prosecutor any special [*22] license to use conjectural opinion testimony predicated on inadmissible hearsay facts.

In my opinion, the **profilist's** testimony was clearly inadmissible and the defense took a specific continuing objection to all of it. The opinion testimony of the **profilist** was obviously offered by the state to zealously take what appeared to be a self-defense or manslaughter oriented defense and, through the creative genius of the **profilist**, convince the jury it was murder with the aid of a factual portrait that was improperly in evidence.

The evidence was extremely prejudicial. How can we reasonably say that the **profilist's** testimony did not influence the vote of at least one person on that jury?

While zeal in the prosecution of criminal cases is to be admired, the prosecution must accept the facts as it finds them and not let its zeal become machiavellian. A jury should be allowed to weigh the evidence in this case free of a conjectural portrait by a criminal **profilist** and decide whether this defendant is guilty of murder or manslaughter, or that it was self-defense.

DISSENTBY: QUILLIN

DISSENT: QUILLIN, J. DISSENTS SAYING:

On October 21, 1986, Doug Fauver was found dead in his apartment. He had been stabbed eight [*23] times in the chest and neck. In his back a butcher knife was buried up to its hilt.

Defendant-appellant Richard Haynes was charged with murder and auto theft based primarily on various statements he had made. In all the statements, Haynes admitted purposely killing Fauver. The statements did, however, include differing exculpatory assertions.

Haynes did not testify. His defense was presented through the exculpatory portions of his statements obtained after he had fled and was finally captured several months later. The prosecution was thus placed in the awkward position of having to discredit the exculpatory portions of Haynes' statements without the opportunity to cross-examine Haynes himself.

A Donald Thompson testified that on Halloween Friday in October of 1986 defendant admitted the killing. Haynes told Thompson that he hated "fags" and, when the guy (Fauver) put his hand on Haynes leg, they began to struggle and that is when Haynes stabbed him. Haynes did not say anything about being raped. Haynes also said his wrist was cut in an unrelated bar fight.

Even accepting the most favorable confession of Haynes, self defense was not established and the jury so found. Therefore, even [*24] if the majority is correct in saying that the testimony of the psychologist prejudicially exceeded proper limits, the case should be remanded with instructions to grant a new trial only if the state will not agree to accept a voluntary manslaughter conviction.

However, I don't believe the trial judge erred in accepting a guilty verdict on the murder charge.

In the exculpatory portion of his confession, Haynes claims that when he awakened, he was told that Fauver had performed fellatio upon him. Did he react with sudden rage? No. He walks into the bathroom and puts his head under a cold shower. Haynes later begins to tear up the room. When Fauver, with a knife, attempts to stop him, a struggle ensues. Haynes takes away the knife, stabs Fauver eight times and, as Fauver attempts to flee, pursues him and stabs him in the back with a second knife.

It is conceded by all that this was a purposeful killing. The defense claims that the purposeful killing (murder) is mitigated to voluntary manslaughter. To do so, the purposeful killing must be done under the influence of sudden passion or in a sudden fit of rage brought on by serious provocation reasonably sufficient to incite [*25] the use of deadly force.

I will concede that under the influence of sudden passion or sudden fit of rage is a concept that the average juror is capable of understanding and applying. There is no necessity that this be explained by an expert. although there is no such necessity, it does not follow that expert testimony is always erroneous. It can be proper if it will assist the trier of the fact.

I will also concede that the psychologist's testimony exceeded, in part, proper bounds. There was, however, only a general objection to his testimony. It is unreasonable to expect a trial judge without a specific objection, to interrupt a witness. There is no claim of plain error.

The prime defense was that this was merely voluntary manslaughter with a dash of self defense thrown in. These defenses are inconsistent. If the defendant had testified, it would have been impossible to sell both defenses to a jury. Although it was easier to argue this blended defense when the defendant did not testify, the facts in this case can support neither one. The jury and the trial judge had no difficulty seeing through the transparent defense. Neither should we.

I would affirm the conviction.

State of Ohio,) SS:
County of Cuyahoga.)

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IN THE COURT OF COMMON PLEAS

- - -

ALAN DAVIS, et al.,)
Plaintiffs,)
v.) Case No. 312322
) Judge Ronald Suster
STATE OF OHIO,)
Defendant.)

- - -

THE DEPOSITION OF GREGG O. McCRARY

MONDAY, JANUARY 24, 2000

- - -

The deposition of GREGG O. McCRARY, a witness, called for examination by the Plaintiffs, under the Ohio Rules of Civil Procedure, taken before me, Cynthia A. Sullivan, Registered Professional Reporter and Notary Public in and for the State of Ohio, pursuant to notice, at the offices of Terry Gilbert, Esq., 1700 Standard Building, Cleveland, Ohio, commencing at 10:05 a.m., the day and date above set forth.

- - -

A. I decided it was time to captain my own ship. I had spent my life working for other people and decided that if I was ever going to work for myself, now would be the time to do that.

Q. Let me go over your educational background. You have a Bachelor of Fine Arts degree at Ithaca College?

A. Yes, sir.

Q. What field was that?

A. That was actually a triplum major. I had history, English and music. It was a Fine Arts degree. I got that from Ithaca College in 1967.

Q. What did you do after you graduated in 1967?

A. I taught high school and coached the wrestling team for a couple of years while I was trying to figure out what I wanted to do with my life.

Q. Your undergraduate degree involved no academic area involving criminology, law enforcement, psychology or anything like that?

A. There was some psych. courses in there, but no undergraduate degree.

Q. Do you have any postundergraduate degrees?

A. No.

Q. On your resume you did some graduate studies in criminal justice at Long Island University.

A. Yes, sir.

Q. Was that through your employment with the FBI?
A. Well, it was while I was employed at the FBI. It wasn't through the FBI. I did that on my own.
Q. You were taking just part-time coursework?
A. Yes, sir.
Q. But you didn't get a degree; is that correct?
A. That's correct.
Q. It indicates that in 1989 to 1990 you had additional graduate studies at the University of Virginia.
A. Yes, sir.
Q. In what area of interest was that?
A. That was primarily in adult education. When I was transferred to the FBI Academy, they wanted all the staff members to have completed graduate-level courses in adult education because we teach adults a lot and adults learn differently than nonadults, so it was a requirement there at the academy that everyone complete the courses in adult education.
Q. You list here a Master of Arts in Psychological Services at Marymount University, Arlington, Virginia, 1992.

Did you actually get a Master of Arts degree?
A. Yes.
Q. But I asked you earlier if you had any

postundergraduate degrees, and you said no.
A. That's a graduate degree. It's a Master's degree. I consider that a graduate degree and not an undergraduate degree.
Q. Maybe you misunderstood the question.
A. Undergraduate degree.
Q. I said postundergraduate. That's what I thought I asked you.
A. I misunderstood. You asked me if I had any others.
Q. What is a Master of Arts in Psychological Services?
A. It's a degree in -- basically a Master's in psychology. What made this a little different than most is that most of the folks who complete that course are interested in therapy and clinical work. I was not. I explained that when I applied to go to school there, and rather than doing internships in therapy and clinical work, they allowed me to do independent projects on violence and the psychopathology of violence which is my interest.

Instead of doing the typical therapy or clinical work or internships and that sort of thing, they designed courses where I could do independent study in the psychopathology of violence, so it was a

concentration in that area.
Q. You are not a psychologist; is that correct?
A. That's correct.
Q. You are not licensed to do clinical or therapeutic work; is that correct?
A. That's correct.
Q. You are not a forensic psychologist; is that correct?
A. I'm not any kind of a psychologist.
Q. The Master's of Psychological Services leads to what qualifications in terms of a professional application?
A. Well, a lot of those folks go out and work in mental health facilities. If they are going to practice, they have to practice generally under the wing of a Ph.D. and so forth if they are going to practice in clinical practice or therapy. Some go into prisons. A lot of the prison psychologists and a lot of people with the Master's degree work in that area but, again, typically under the wing of a Ph.D.
Q. Have you missed anything regarding the extent of your formal academic education?
A. No, sir.
Q. You were employed by the FBI from 1969 to 1994; is that correct?

A. Did I personally conduct?
Q. Yes.
A. I don't understand what you mean by personally. That I was personally involved in investigating?
Q. Yes.
A. A number of homicide investigations. I couldn't give you a number.
Q. How many domestic homicide investigations did you personally conduct?
A. Well, there would be no federal violation. I would have been conducting them as support to local law enforcement when they asked assistance.
Q. So you have never actually conducted a domestic homicide investigation; is that correct?
A. I never had a domestic homicide investigation assigned to me because they are typically not a federal violation.
Q. So your answer is no?
A. Yes.
Q. So tell me what the behavioral science unit of the FBI does?
A. It is a behavioral science oriented unit designed to consolidate research and operational support; research, training and operational support to any law enforcement agency that is confronted with unusual or

A. That's part of it, yes.
Q. In crime and crime scene analysis in your opinion it is appropriate to identify a perpetrator?
A. If the evidence allows that.
Q. Have you ever testified in court regarding a crime scene analysis?
A. Yes.
Q. How many times?
A. A number of times in court; 30 times, 40 times, something like that.
Q. Any domestic homicides?
A. Sure.
Q. What did you testify to?
A. It was a domestic homicide. It was a staged domestic homicide.
Q. Do you recall the name of the case?
A. I'd have to go back and look. There was one in Georgia that jumps out. I've testified to a staging on a number of cases. I have testified in some domestic homicide cases. I'm drawing a blank. One in Georgia which, again, I forget the name.
Q. Do you remember the name of the defendant?
A. Hang on, it will come to me. It begins with an N, I think.
MR. MASON: Why don't we

just provide it for you?
A. I can come up with that if you give me a chance.
Q. In those cases you testified on staging, right?
A. Yes, sir.
Q. Were you permitted to testify as to who you thought committed the crime?
MR. MASON: Objection.
A. I did not do it in the presence of the jury. I had been asked to offer opinions outside the presence of the jury, but not in the presence of the jury. Those are in criminal cases I might add.
Q. And those cases were in connection with your position as an FBI agent; is that correct?
A. Yes, sir.
Q. In criminal cases?
A. Yes.
Q. You don't have a list of the cases that you testified in, do you?
A. No, I don't. I've got some of the civil cases I have testified in recently, but not a whole list of every case I have ever testified in.
Q. In your CV you indicated the various operational support of major investigations that you were involved in?
A. Yes, sir.

Q. Is that an exhaustive list of all the major cases you were involved in?
A. No, sir, not all the cases.
Q. Is there any particular reason you put certain cases in and not others?
A. These are cases which many times involved task force investigations that were complex investigations; many times they were multiple victims, many times they were serial crimes, serial rape investigations or were high profile cases for one reason or another.
Q. Getting back to your specialized training, in your CV I don't see any training whatsoever in the field of domestic violence or homicides, is that correct, that you never had any specialized training in that area?
A. No, sir.
Q. Tell me where you have had that.
A. It's in the criminal investigative analysis, in the profile coordinator training. We do all sorts of homicides, everything from sexual homicides to drug-related homicides to domestic homicides, gang-related homicides. All of that is included.
Q. Under what training in your CV would that be under?
A. Profile/NCAVC Coordinator, 1985; Advanced

Profile/NCAVC Coordinator, 1987; the Advanced Investigative Crime Seminar in 1982; the in-house training I did at the bureau when I came down into the behavioral science unit from '88.

Q. Have you published anything?

A. I was contributing author to the Crime Classification Manual. I have also coauthored an article on stalking.

Q. Where is that? Is that listed in your CV?

A. Certainly, yes, listed under publications, "A Typology of Interpersonal Stalking", I believe is the title of that.

Q. Maybe it's in the new one?

A. It should be in the old one under publications, page 9.

Q. Is that the only article you ever published?

A. Yes, sir.

Q. You are not listed as an author of the Crime Classification Manual; is that correct?

A. Those are the editors that are listed on the cover.

Q. What was your role?

A. A contributing author to that.

Q. What section did you write?

A. I contributed to all those sections.

Sometimes we would hand write things in and sit in meetings and say, here are the characteristics for sexual homicide or whatever. We would go over them and some were redundant, some were different, and we would refine those and then have the secretary write that up. Then we would submit that from the committee to the editors and so forth. That's how it worked.

Q. But you were not in the same category as the people I mentioned in terms of their role in this case, correct?

A. They were the editors.

Q. Have you done any research?

A. Yeah, lots of research.

Q. Where is the research located?

A. Well, it's part of the body of the research that the FBI has done.

Q. Have you personally conducted any research where the findings have been published?

A. Well, it would be in conjunction with a lot of the research that has been published by the FBI. They don't identify the agents by name necessarily.

Q. My question is, have you conducted any research yourself that has been peer reviewed and published?

A. Under my name?

Q. Yes.

A. No.
Q. In the Crime Classification Manual there are obviously a number of people that were consulted from different specialties; is that correct?
A. Yes, sir.
Q. Do you have any forensic training?
A. Well, lot's of forensic training.
Q. What forensic training have you had?
A. All of that from new agent training in 1969 through in-service training through some of the other courses that I have listed there.
Q. Do you have any training or are you an expert in bloodstain pattern analysis?
A. No.
Q. Are you an expert in medical issues?
A. I'm not a medical expert. Again, if you look at that you'll see I've been, for example, to the Armed Forces Institute of Pathology. I've completed courses in basic and advanced basic forensic pathology. I don't consider myself to be a forensic pathologist. On the other hand, I think I have an understanding of some of these issues.
Q. I understand. But you are not considered to be a forensic specialist in any area, are you?
A. Depends on what you mean by forensic specialist.

Q. Are you a member of any forensic association or organization?
A. If you look at the list of memberships, you'll see. I think it's on page 9 as well.
Q. Are you a member of the American Academy of Forensic Sciences?
A. No. I've lectured there.
Q. What is behavioral criminology?
A. Other than my company, you mean other than that?
Q. Is there a field called behavioral criminology?
A. I don't know that there is a field specifically named that. Certainly I named my company that to try and distinguish this from other sorts of academic criminology as well because we consider behavioral issues in the criminal investigative analysis process as well as forensic issues.
Q. This is a name you came up with, is that correct, for your company?
A. Sure.
Q. There is no recognized field called behavioral criminology; is that correct?
A. Not that I'm aware of.
Q. There is a field called criminology?
A. Certainly.
Q. What is criminology?

A. It's a study of crime.
Q. Are you a criminologist?
A. Yes.
Q. Are you licensed as a criminologist?
A. I don't think any criminologist is licensed. I'm a member of the American Society of Criminology, the British Society of Criminology.
Q. I understand you're a member of those groups.
Are there degrees in criminology that one can get at universities?
A. You can get academic degrees.
Q. You don't have an academic degree in criminology?
A. No, sir.
Q. Doesn't criminology primarily dealing with the collection and interpretation of crime-related statistics?
A. Some criminology is. There are all sorts of different subfields of criminology. The academic criminologists a lot of times just sit there and crunch stats and numbers. There are other issues with criminology. It's a broad field. It deals with all the relationships of crimes, criminals, causes of crimes. It's a wide field with many subspecialties.
Q. You are not a sociologist; is that correct?
A. No.

Q. You have never had any training in sociology?
A. Sure. There is sociology that goes into some of the psychology courses with social psychology, and you're dealing with social psychological issues.
Q. There are degrees and licenses in sociology; is that correct?
A. Yes.
Q. You don't have any of those?
A. That's correct.
Q. Now, this concept called crime scene criminal investigative analysis, you recognize that as a scientific discipline?
A. It's a social science.
Q. Where is that field recognized?
A. In law enforcement and investigations.
Q. Is it recognized by any forensic associations?
A. Well, the courses I took, the workshops I took are accredited by the American Psychological Association. I guess they feel it's credible.
Q. Is it a listed field in forensic science?
A. It's not a forensic science, no.
Q. Well, you're testifying about your analyses in court, correct?
A. Yes.
Q. Forensic means what?

Q. There was an article, I'll let you look at it, by the Mercury News staff, April 5th, 1996 where you were quoted, and I'll let you look at it if you want.

Gregg McCrary, a former FBI agent who developed personality profiles of serial killers in the agency's behavioral sciences unit, said the one developed for the Unabomber pretty accurately described Kaczynski as a loner, an underachiever and extremely intelligent. You were quoted as saying, we tend to be 80 percent accurate in the profiles. McCrary said, then you quote, this is far from a hard science and the purpose is to screen potential suspects.

A. I don't disagree with anything.

Q. This is not a hard science, correct?

A. It's a social science.

Q. What you do is not a hard science?

A. Of course not.

Q. Mistakes are made?

A. Mistakes are made in hard science, too.

Q. Let's continue on.

A. The question with the Unabomber case was whether the guy had a Ph.D., and I think the profile said everything but the Ph.D.

Q. And it turned out he did have a Ph.D.?

A. I think it was close, but not quite there.

A. The other part is the databases on robbery homicides and sexual homicides, and we also depend upon the academic literature as well.

Q. Can you tell me what the uniform crime reporting system says? What kind of data does that system have?

A. It has data that is reported by police departments as to the number and types of homicides, offenders, victim relationship, type of weapon used. There is all sorts of data that's collected in the course of that, in the course of compiling the statistics.

Q. Do you know in terms of if there are any studies that have been done on the staging of domestic homicides?

A. Staged domestic homicides per se but academic?

Q. Yes.

A. I don't remember. There is a bunch of literature on staged domestic homicides that's out there.

Q. Do you know if there has been any kind of statistical studies of domestic homicides and the breakdown in terms of staging or nonstaging?

A. I don't know if it's broken down that way exactly.

Q. Any empirical studies?

A. There is lots of research on domestic homicides

and how to respond both in the academic community, in the therapeutic community, and to a degree I'm assuming the law enforcement community, and that has shaped how police are responding to crimes and handling them. Like stalking and other issues that have come into play with domestic violence, that's all being researched and studied and is changing the face of law enforcement even as we speak.

Q. Can you site any studies that deal with staged domestic homicide?

A. Off the top of my head, I can't. I don't know.

Q. Do you recall seeing anything?

A. It's certainly mentioned in all the homicide literature. In Vern Geberth's book, for example, Practical Homicide Investigation, at the very beginning it talks about staged homicides and how homicide investigators have to be sensitive to stagings.

There is a new book, Death Investigator's Handbook, where they talk about investigating and the use of criminal analysis. It's the sort of thing that homicide investigators deal with on a daily basis, and it's fundamental to the approach of any investigator.

Q. Would you agree that what you do in terms of criminal investigative analysis is only as good as the investigation being conducted by the police

involved?
A. He may have had.
Q. So here we have two former members of the behavioral science unit who did similar kinds of work in that unit, correct?
A. Yes.
Q. Similar training, similar experience, correct?
A. Correct.
Q. Coming up with two totally different opinions?
A. I wouldn't say totally different. I think John is saying it's someone close to the family and has intimate knowledge, or he's leaning away from the stranger intruder as we both do. He's saying that John didn't have anything to do with it. I think initially he said both, but I think he's saying now that John Ramsey had nothing to do with it.

As I have said publicly about that job, he may have access to material I haven't, he may know something I don't know, but based on what I know, and I have no inside information in this case, my opinion is what it was, but it may change if I had additional information.

Q. This difference of opinion would lend support to the notion that this was not an exact science, correct?
A. Well, I have always said it's not.